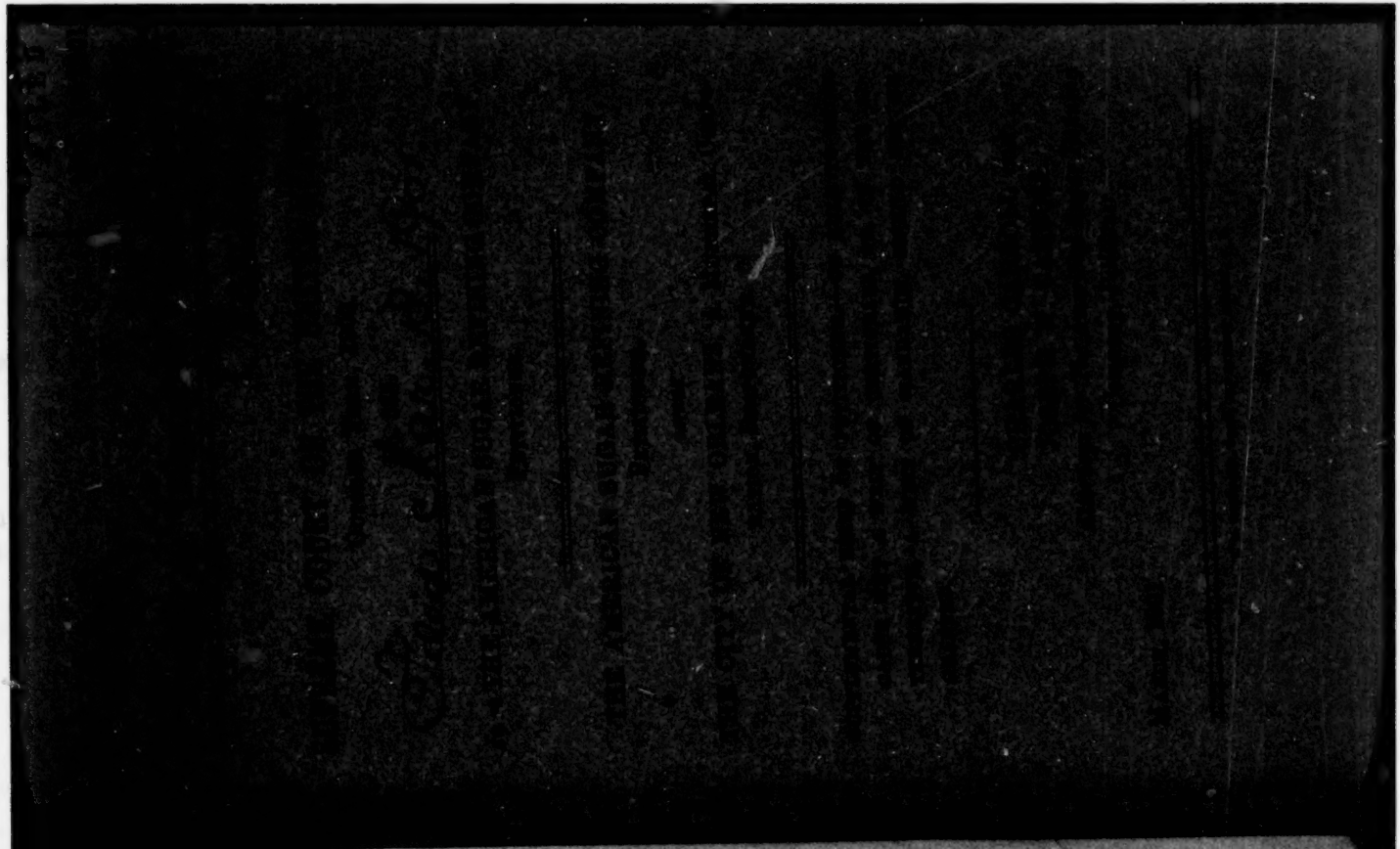

34971

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 535.

In re THE AMERICAN SUGAR REFINING COMPANY.
PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY,
PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

SUPPLEMENTAL BRIEF OF PETITIONER.—ON RULE TO SHOW CAUSE WHY A WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, A WRIT OF MANDAMUS, SHOULD NOT BE GRANTED.

May it please your Honors:

As the decision of this Court in *Loeb vs. Trustees of Columbia Township, 179 U. S. 472,* has been reported and has come to our knowledge since the filing of the petition in this matter, and as counsel for respondents have since filed a brief in opposition to the petition, we respectfully

ask leave to submit this supplemental brief in support of the petition.

It is said by counsel for respondents that in the cases cited in our former brief (*American Const. Co. vs. Jacksonville Ry., 148 U. S. 372; Colorado Central Mining Co. vs. Turck, 150 U. S. 138; Borgmeyer vs. Idler, 159 U. S. 408; Press Pub. Co. vs. Monroe, 164 U. S. 105; Ex parte Jones, 164 U. S. 691; Third St. Ry. Co. vs. Lewis, 173 U. S. 457; and Pope vs. Ry. Co., 173 U. S. 573*), the inquiry was neither as to the appellate jurisdiction of this Court under the fifth section of the Appellate Courts Act of March 3d, 1891, nor as to the appellate jurisdiction of the Court of Appeals under the sixth section, but was as to the appellate jurisdiction of this Court over the Court of Appeals under the sixth section of that act.

Assuming this to be true, the discussion in each one of those cases necessarily involved consideration of the appellate jurisdiction of this Court and the Court of Appeals under those sections.

The act provides, section 6:

"The judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States."

In every one of the cases cited the Court has construed the "*jurisdiction*" referred to above as being the jurisdiction of the Circuit Court. The result, therefore, of such construction is necessarily that the judgment of the Court of Appeals is final in those cases in which the jurisdiction of the Circuit Court is dependent entirely upon diverse cit-

izenship. If, then, the judgment of the Court of Appeals is, by the act, made final in *all* cases in which the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship of the parties, by necessary implication the Court of Appeals has power to review all judgments of the Circuit Court in which the jurisdiction of the Circuit Court has attached solely by reason of such diversity of citizenship. There is, we submit, no escape from that conclusion.

Hence, the discussions in the cases cited necessarily embraced consideration of the respective jurisdictions of this Court and the Court of Appeals, and are pertinent to the present issue.

But it is said that the fifth section of the act confers appellate jurisdiction upon this Court "in any case in which the law of a State is claimed to be in contravention of the Constitution of the United States." Taken alone such language is surely broad enough to embrace all cases in which a federal question is at issue, whether raised by plaintiff or by defendant. But taken in connection with the part of the sixth section quoted above, with the construction uniformly put upon it by this Court, it would seem to be limited to those cases in which such constitutional question is raised which do not depend solely upon diverse citizenship as a ground of jurisdiction of the Circuit Court.

Even in the *Loeb case* there was no denial of the jurisdiction of the Court of Appeals. On the contrary, *Mr. Justice Harlan* seems to concede the right of appeal to the Court of Appeals:

"It is true that the plaintiff might have carried this case

to the Circuit Court of Appeals, and, a final judgment having been rendered in that Court upon his writ of error, he could not thereafter have invoked the jurisdiction of this Court upon another writ of error to review the judgment of the Circuit Court; for, as said in Robinson vs. Caldwell, 165 U. S. 359, 362, 'it was not the purpose of the Judiciary Act of 1891 to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits both in this Court and in the Circuit Court of Appeals,' although the latter Court, before disposing of a case which might have been brought here directly from the Circuit Court, may certify to this Court questions or propositions as indicated in the sixth section of the above act. But the plaintiff was not bound to go to the Circuit Court of Appeals, and thereby cut himself off from the right to have this Court declare whether the Circuit Court erred in holding that the State law upon which he relied for judgment was repugnant to the Constitution of the United States." *Loeb vs. Trustees of Columbia Township, 179 U. S. 472.*

In that case, the Court still construed the sixth section as making final the judgments of the Court of Appeals in all cases in which the jurisdiction of the Circuit Court attaches solely on the ground of diverse citizenship. So that it would seem that the *Loeb case* establishes a concurrent appellate jurisdiction in such cases in this Court and the Court of Appeals, neither exclusive of the other, except that both cannot exercise it in the same case.

But counsel for respondents say that, under the doctrine of *Carter vs. Roberts, 177 U. S. 496*, it was discretionary with the Court of Appeals whether it would take or decline jurisdiction, and that we took the risk of the Court not hearing the case. The answer to that is that it would be idle to give a right of appeal and then leave it optional

with the appellate court whether it would hear or not hear.

In the first place, *Carter vs. Roberts* was not a case in which the jurisdiction of the Circuit Court attached solely because of diversity of citizenship; the jurisdiction was based on the assertion of a federal right. The Court of Appeals might well have declined jurisdiction in that case, because it is not among the classes of cases included in the sixth section. But this Court held, as we appreciate the decision, that Carter having invoked the appellate jurisdiction of the Court of Appeals was estopped from taking another chance of favorable decision from this Court in the same case.

In the next place, as the judgment of the Court of Appeals is final in *all* cases in which the jurisdiction of the Circuit Court is dependent solely on the diverse citizenship of the parties, the Court of Appeals necessarily has jurisdiction of all those cases; and, as the case at bar is a case in which the jurisdiction of the Circuit Court was dependent solely upon diverse citizenship, therefore the Court of Appeals necessarily has jurisdiction of the case at bar, irrespective of whether this Court might also have jurisdiction.

This conclusion does not deny the jurisdiction of this Court under the fifth section, but its necessary consequence is that there is a class of cases in which the appellate jurisdiction of the Supreme Court and the Court of Appeals co-exists.

No other conclusion is possible, we submit, under the authorities quoted. The uncertainty in the Act of 1891, it

seems to us, lies in the expression in the sixth section, which reads:

"The judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States."

If the "*jurisdiction*" there mentioned be the jurisdiction of the Circuit Court, as has been uniformly held, then the concurrent appellate jurisdiction of this Court and the Court of Appeals is established in all those cases in which the jurisdiction of the Circuit Court attaches solely because of diversity of citizenship and a constitutional question subsequently arises in the same case. The only construction which would preserve the exclusive appellate jurisdiction of each Court, if we may venture our opinion, would be that the "*jurisdiction*" referred to in the clause of the sixth section above quoted is the jurisdiction of the Court of Appeals; that is, that the judgment of the Court of Appeals is final in all cases in which the jurisdiction of the Court of Appeals is dependent solely on diverse citizenship. Under such a construction the broad meaning of section 5 adopted in the *Loeb case*, would vest this Court with exclusive appellate jurisdiction of all cases coming within its terms, while the Court of Appeals would have no jurisdiction of any case which falls within the terms of section 5. But it would have exclusive and final jurisdiction of all cases in which its jurisdiction is dependent solely upon diversity of citizenship. In all other cases—that is, in all cases not within section 5, and not dependent solely upon diversity of citizenship as a ground of jurisdiction and not within any other exception of section 6—the Court of Appeals would have exclusive but not final jurisdiction.

What we have just said is intended to point the argument that the *Loeb case*, while upholding the jurisdiction of this Court, does not deny the jurisdiction of the Court of Appeals, inasmuch as it seems to concede that the Court of Appeals has jurisdiction of all cases in which the jurisdiction of the Circuit Court attaches solely by reason of diversity of citizenship of the parties.

If, however, the Court shall conclude that it has exclusive appellate jurisdiction of the case at bar, then we submit that, at the time the writ of error was sued out in this case (January, 1900), the judicial expressions in the cases cited in this and our former brief, were such as to justify the opinion that the writ was properly sued out from the Court of Appeals. And we may not improperly add that before the writ was applied for, careful consideration was given to the statute of 1891 and the adjudged cases.

The only case prior to that time which seems in any way opposed to the conclusion reached is *Holder vs. Aultman, 169 U. S. 81*, cited it the *Loeb case*, in which the question of jurisdiction does not appear to have been contested; and the head-note of this case does not indicate consideration of the question to which the *Loeb case* cites it; nor do the digests cite it to any other point than that this Court will determine all questions involved when it has jurisdiction on any ground, on appeal from an inferior federal court.

The time has long since expired when petitioner could stay the judgment of the Circuit Court by a *supersedeas* on a writ of error direct from this Court. The defendant City of New Orleans is amply secured by the bond given on the writ of error from the Court of Appeals; and we respectfully submit that it will be in no manner prejudiced by the

granting of a writ of *certiorari* herein. This is not a case where the petitioner is seeking to have two trials of the same question on appeal; all that it seeks is to have the case heard by an appellate court, and it has been guilty of no negligence, we submit, which should deprive it of that right. In no case cited has the party seeking a review of the judgment of the Circuit Court been denied a hearing in one appellate court, and it appears to have become the settled practice (prior to the *Loeb case*) to invoke the appellate jurisdiction of the Courts of Appeals in all cases of the character of the one at bar, and the Courts of Appeals have uniformly considered such cases as falling within the terms of the sixth section and have exercised appellate jurisdiction therein.

As the case is unquestionably one of a class in which this Court has repeatedly held the judgment of the Court of Appeals to be final and as we have no right to a writ of error from this Court to the Court of Appeals, unless the writ of *certiorari* be granted, petitioner is left in the position of having its writ of error lodged in a Court which, while having final jurisdiction, yet refuses a hearing.

We respectfully submit that relief should be granted petitioner. If the Court of Appeals, either as a matter of law or as a matter of judicial discretion, properly declined to take jurisdiction of the writ of error, then a proper case is made for the exercise by this Court of a writ of *certiorari*.

Respectfully submitted,

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JOSEPH W. CARROLL,
Attorneys for The American Sugar Refining Company, Petitioner.

MARCH, 1901.